Re Tan Swee Hong Elaine, ex p Deutsche Bank AG (formerly known as Deutsche Bank (Asia) AG and also formerly known as European Asian Bank AG)

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D4–29–1819–1991
ZAKARIA YATIM J
3 JUNE 1994

Bankruptcy *— Notice — Required judgment debtor to pay in Singapore dollars — Permission of Controller of Foreign Exchange not obtained — Whether notice bad in law — Exchange Control Act 1953 ss 8, 9 & Fourth Schedule Item 4*

The deputy registrar made receiving and adjudication orders against the judgment debtor who has appealed against that decision. The only issue raised at the hearing of the appeal was whether the bankruptcy notice was bad in law in contravention of ss 8 and 9 of the Exchange Control Act 1953 as the judgment debtor was not told whether permission had been obtained from the Controller of Foreign Exchange ('the Controller') for the judgment debtor to pay in Singapore dollars.

Held, dismissing the appeal:

Under para 4 of the Fourth Schedule to the Act, a demand for the repayment of a debt due in the bankruptcy notice is not defeated by the fact that the permission of the Controller had not been obtained. Therefore, the bankruptcy notice did not contravene the Act and was a valid notice issued pursuant to the law. As the judgment debtor did not comply with the bankruptcy notice, that constituted an act of bankruptcy.

[Bahasa Malaysia summary

Penolong pendaftar telah membuat perintah penerimaan dan penghukuman terhadap penghutang penghakiman yang telah membuat rayuan terhadap keputusan itu. Isu tunggal yang telah dibangkitkan pada pendengaran rayuan itu adalah sama ada notis kebankrapan itu cacat dari segi undang-undang kerana melanggar ss 8 and 9 Akta Kawalan Pertukaran Wang 1953 kerana penghutang penghakiman tidak diberitahu sama ada kebenaran telah diperolehi daripada Pengawal Pertukaran Wang Asing ('Pengawal itu') untuk membenarkan penghutang penghakiman membayar dalam dollar Singapura.

Diputuskan, menolak rayuan itu:

Di bawah perenggan 4 Jadual Keempat Akta itu, suatu tuntutan untuk pembayaran balik hutang di bawah suatu notis kebankrapan tidak akan gagal hanya disebabkan bahawa kebenaran Pengawal itu

A tidak diperolehi. Oleh itu, notis kebankrapan itu tidak melanggar Akta itu dan suatu notis yang sah telah dikeluarkan menurut undang-undang. Oleh kerana penghutang penghakiman tidak mematuhi notis kebankrapan itu, ia merupakan suatu tindakan kebankrapan.]

B **Cases referred to**

Bank of New Zealand v Wong Kee Tat [1990] 2 MLJ 435 (folld)
Contract & Trading Co (Southern) Ltd v Barbey & Ors [1960] AC 244; [1959] 3 All ER 846; [1960] 2 WLR 15 (folld)

C **Legislation referred to**

Exchange Control Act 1953 ss 8, 9 36, Fourth Schedule
Bankruptcy Rules 1969 r 91
Exchange Control (Form of Bankruptcy Notice) Order 1992
Exchange Control Act 1947 Sch IV para 4(1) [UK]

D *Tan Chin Toh (KK Chong, Chai & Koo)* for the judgment debtor.
S Mogan (Shearn Delamore & Co) for the judgment creditor.

Zakaria Yatim J: This is an appeal by the judgment debtor against the decision of the deputy registrar who made receiving and adjudication orders against the judgment debtor.

E The only issue raised at the hearing of the appeal was that the bankruptcy notice was bad in law in that it contravened the Exchange Control Act 1953 ('the Act').

Mr CT Tan, counsel for the judgment debtor referred to the bankruptcy notice which is reproduced below:

F Bankruptcy notice

To: Elaine Tan Swee Hong
5th Floor, President House,
Jalan Sultan Ismail
50250 Kuala Lumpur.

G Take notice that within seven (7) days after service of this notice on you excluding the day of such service, you must pay to Deutsche Bank Aktiengesellschaft (formerly Deutsche Bank (Asia) Aktiengesellschaft and also formerly European Asian Bank Aktiengesellschaft) a bank incorporated in West Germany and having a registered office at 8 Shenton Way, 20–01,
H Treasury Building, Singapore 01–06 and care of Messrs Shearn Delamore & Co and Drew & Napier, Standard Chartered Bank Building, No 2 Benteng, 50050 Kuala Lumpur in the Federal Territory the sum of S$3,257,607.51 or the ringgit equivalent at the time of payment claimed by them as being the amount due on a final judgment together with interest and RM350 costs obtained by them against you in the High Court at Kuala
I Lumpur in Suit No D3–23–2419–88 dated 19 November 1990, whereon execution has not been stayed, or you must secure or compound for the said sum to their satisfaction or the satisfaction of the court; or you must satisfy the court that you have a counterclaim, set off, or cross-demand against Deutsche Bank Aktiengesellschaft (formerly Deutsche Bank (Asia)

Aktiengesellschaft and also formerly European Asian Bank Aktiengesellschaft) which equals or exceeds the sum claimed by Deutsche Bank Aktiengesellschaft and also formerly European Asian Bank Aktiengesellschaft) and which you could not set up in the action in which the judgment was obtained.

Dated 10 April 1991

By the court
—Sgd—
Senior assistant registrar
High Court, Kuala Lumpur

Mr CT Tan said that the judgment debtor was not told whether permission had been obtained for the judgment debtor to pay in Singapore dollars. He added that the bankruptcy notice, which required payment to be made in Singapore dollars did not conform with Form 5. He referred to ss 8 and 9 of the Act, and submitted that any payment pursuant to the bankruptcy notice would contravene the Act. He also referred to s 36(1), (2) and (3) and the Fourth Schedule to the Act. Accordingly, he said, non-compliance with the bankruptcy notice did not constitute an act of bankruptcy.

Miss S Mogan, counsel for the judgment creditor submitted that under ss 8 and 9 of the Act, permission is required before any funds are transmitted out of Malaysia. She referred to Items 4 and 5 of the Fourth Schedule and said that the claim for the recovery of money would not be defeated merely because permission had not been obtained. She added that even if permission was required, the judgment debtor could have paid to Messrs Shearn Delamore & Co in ringgit.

I have read the relevant provisions of the Act. Section 8 provides that no payments are allowed to be made in Malaysia to a person resident outside the scheduled territories without the permission of the Controller of Foreign Exchange. Section 9 prohibits any payment made outside Malaysia without the permission of the controller. Item 1 of the Fourth Schedule provides that ss 8 and 9 shall apply to sums required to be paid by any judgment or order of any court in Malaysia. But under Item 4, a claim for the recovery of any debt shall not be defeated by reason only of the debt not being payable without the permission of the controller. Item 5(1) provides that in 'any bankruptcy ... a claim for a sum not payable without the permission of the controller shall, notwithstanding that the permission has not been given ... be admitted to proof as if it had been given ...'.

Item 4(1) of the Fourth Schedule is in pari materia with para 4(1) of Sch IV to the Exchange Control Act 1947 of the United Kingdom. In *Contract & Trading Co (Southern) Ltd v Barbey & Ors* [1960] AC 244; [1959] 3 All ER 846; [1960] 2 WLR 15, the House of Lords decided that para 4 of Sch IV was apt to include an obligation arising under a bill of exchange as well as any other monetary obligations. A debt existed even though Treasury permission had not been granted, and it might not be paid without that permission. Accordingly, a debt under a bill of exchange

A was one to which para 4 applied, and a claim for its recovery was not defeated by the fact that permission to pay had not been given.

The above decision of the House of Lords was followed by Eusoff Chin J in *Bank of New Zealand v Wong Kee Tat* [1990] 2 MLJ 435 where the learned judge held that a loan transaction was not illegal and void
B simply because the permission of the Controller of Foreign Exchange had not been sought.

Following the decision in *Contract and Trading Co*, under para 4 of the Fourth Schedule, a demand for the repayment of a debt due in the bankruptcy notice is not defeated by the fact that the permission of the
C Controller had not been obtained.

Under the Exchange Control (Form of Bankruptcy Notice) Order 1992, the form of the bankruptcy notice to be used for the purposes of the Act shall be in Form No 5 as prescribed by r 91 of the Bankruptcy Rules 1969.

D In my opinion, the bankruptcy notice does not contravene the Act and it is a valid notice issued in pursuance of the law. It conforms with Form 5 of the Bankruptcy Rules 1965. The judgment debtor did not comply with the bankruptcy notice. Failure to comply with the bankruptcy notice constitutes an act of bankruptcy. The judgment debtor could have complied with the bankruptcy notice by making payment to Messrs Shearn
E Delamore & Co in Kuala Lumpur in the ringgit equivalent.

For the reasons stated above, I dismissed the appeal with costs.

Appeal dismissed.

Reported by Jeanne Tan

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